

invent, to produce or to compete is not inhibited. The RFA was based on two premises: 1) that federal agencies often did not recognize the impact that their rules would have on small businesses; and 2) that small entities have been disproportionately disadvantaged in the past by shouldering the same burden of federal regulation as their larger counterparts.<sup>47</sup> Accordingly, the RFA amended the Administrative Procedures Act ("APA") to fundamentally change the Federal bureaucracy's method of regulating small businesses.

The RFA's primary goals are: (1) to increase federal agency awareness and understanding of the impact of regulations on small business by requiring agencies to identify and explain those impacts, (2) to require that agencies communicate and explain their findings to the public, including notification beyond the traditional Federal Register notices, and (3) to provide regulatory relief for smaller businesses.<sup>48</sup> To

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<sup>46</sup>(...continued)

independently owned and operated and is not dominant in its field. Small government jurisdictions are defined as the governments of cities, counties, towns, townships, villages, school districts or special districts with a population of less than 50,000. Because the Act is focused primarily on small business, the term "small business" as used herein refers to all three types of small entities covered by the Act.

<sup>47</sup>Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year 1992, U.S. Small Business Administration, Office of the Chief Counsel for Advocacy, 1992, p. 2.

<sup>48</sup>Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year  
(continued...)

accomplish these goals, federal agencies are required to analyze the likely impact of their planned regulatory actions and proposed rules on small business.<sup>49</sup> The agencies must balance the burdens imposed on small business by their regulations against their benefits, and, where necessary, propose alternative regulatory schemes which do not disadvantage small businesses.<sup>50</sup>

The Act applies to every federal rule for which notice and comment is required by Section 553(b) of the APA<sup>51</sup>. The RFA operates in conjunction with the APA by requiring agencies to follow certain procedural steps in the rulemaking process.

The heart of the RFA is its requirement that all proposed rulemakings and regulatory activities be reviewed by the promulgating agency to determine whether they will have a significant economic impact on small businesses.<sup>52</sup> Agencies then have two options under the statute: they must either conduct a detailed initial regulatory flexibility analysis of the rules' impact on small business,<sup>53</sup> or issue a certification stating that

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<sup>48</sup>(...continued)  
1988, U.S. Small Business Administration, Office of the Chief Counsel for Advocacy, 1988, p. 1.

<sup>49</sup>5 U.S.C. § 603(a).

<sup>50</sup>Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, supra note 48.

<sup>51</sup>5 U.S.C. § 553(b).

<sup>52</sup>5 U.S.C. § 603(a).

<sup>53</sup>5 U.S.C. § 603.

no significant impact is expected.<sup>54</sup> Moreover, prior to issuing any final rule, the agency must prepare a final regulatory analysis<sup>55</sup>.

Specifically, if a proposed rule is expected to have a significant economic impact - positive or negative - on a substantial number of small businesses, § 603 entitled "Initial Regulatory Flexibility Analysis" requires the agency to prepare and publish in the Federal Register an initial regulatory flexibility analysis, describing that impact. Each initial regulatory flexibility analysis is required to include:

- a description of the reasons why action by the agency is being considered;
- a succinct statement of the objectives of, and legal basis for, the proposed rule;
- a description of, and when feasible, an estimate of the number of small entities to which the proposed rule will apply;
- a description of the reporting, record-keeping, and other compliance requirements of the proposed rule; and
- an identification of all federal rules which may duplicate, or conflict with the proposed rule.<sup>56</sup>

The RFA also requires that each initial regulatory flexibility analysis set forth "any significant alternatives to the proposed rule which accomplish the stated objectives of

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<sup>54</sup>5 U.S.C. § 605(b).

<sup>55</sup>5 U.S.C. § 604.

<sup>56</sup>5 U.S.C. § 603.

applicable statutes and which minimize any adverse economic impact of the proposed rule on small entities."<sup>57</sup> Such alternatives may include: differing compliance or reporting requirements for large and small businesses, the use of performance rather than design standards, or an exemption from coverage of the rule or a part thereof, for small businesses.<sup>58</sup>

If a proposed regulation is found to have neither a beneficial nor an adverse effect on small businesses, an agency may forego conducting a detailed regulatory flexibility analysis. Instead, an agency may certify that the rule does not exert a significant economic impact on a substantial number of small businesses.<sup>59</sup> The certification must be published in the Federal Register and be forwarded to the SBA's Chief Counsel for Advocacy.<sup>60</sup> In making such a certification, an agency may not merely state that the rule will not have a significant effect. Instead, the agency must explain its decision to certify, and must discuss why no substantial number of small businesses are expected to be affected.

When an agency issues any final rule, it must either prepare a final regulatory flexibility analysis or again certify

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<sup>57</sup>5 U.S.C. § 603(c).

<sup>58</sup>Id.

<sup>59</sup>5 U.S.C. § 605(b).

<sup>60</sup>The Chief Counsel for Advocacy is responsible for monitoring and reporting on agency compliance with the RFA.

that the rule will not have a significant impact on small business. The final regulatory flexibility analysis must take into account the public comments received and the alternatives considered. Specifically, the RFA requires that the final analysis include:

- a summary of the issues raised by public comments;
- an assessment of those comments;
- a statement of any changes made in the proposed rule as a result of the comments;
- a description of each of the significant alternatives to the rule consistent with the regulatory objectives; and
- an explanation why each alternative was rejected.

In addition to the certification/regulatory flexibility analysis procedure, the RFA includes requirements that each agency 1) publish annually a Periodic Review Plan containing the existing regulations to be reviewed in that year,<sup>61</sup> 2) publish each April and October a Semi-Annual Agenda listing those rules which will have a "significant economic impact on a substantial number of small businesses,"<sup>62</sup> and 3) notify those entities affected by the rule either directly or via publication in relevant trade publications or through public hearings.<sup>63</sup>

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<sup>61</sup>5 U.S.C. § 610.

<sup>62</sup>5 U.S.C. § 602.

<sup>63</sup>5 U.S.C. § 609.

C. The Omnibus Budget Reconciliation Act of 1993

As set forth in detail in the foregoing Petition for Further Rulemaking, Sections 6001 through 6003 of the Omnibus Budget Reconciliation Act of 1993 constitute the Communications Licensing and Spectrum Allocation Improvement Act of 1993 (the "Act") which, among other things, implements a fundamental change in the licensing of radio spectrum for private sector usage. Specifically the Act amends the Communications Act of 1934 to provide the FCC the authority to award licenses by competitive bidding, or auctions. In enacting such legislation, the Congress was clearly concerned that auctions, if not carefully implemented, could effectively preclude the ability of small businesses (and others with limited access to funding) to participate in FCC licensing. Evidence of this concern is found in the following sections which are clearly designed to assure small business access to FCC-licensed spectrum.

For example, with respect to the procedures governing competitive bidding, Section 309(j)(3)(B) of the amended Communications Act authorizes the FCC to utilize a system of competitive bidding to further the objective of:

promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone

companies, and businesses owned by members of minority groups and women.<sup>64</sup>

In establishing its competitive bidding methodology, § 309(j)(4)(C) further requires the FCC to prescribe area designations and bandwidth assignments that promote, among other things "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women" (emphasis added). Finally, § 309(j)(4)(D) requires the FCC to:

ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences and other procedures (emphasis added).

These provisions evidence the continuing recognition by the Congress that small businesses play a vital role in the growth of the economy and in the creation of technological innovation.<sup>65</sup> Accordingly, these provisions are intended to protect and promote meaningful small business participation in one of the fastest growing segments of the economy -- the communications and information industry.

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<sup>64</sup>47 U.S.C. § 309(j)(3)(B)(emphasis added).

<sup>65</sup>See Section II, infra.

D. Federal Programs and Innovation

Pursuant to a variety of other Federal statutes, Federal agencies have implemented numerous programs designed to increase small business participation in the economy. These programs may be classified into three general categories: 1) direct subsidies and grants, 2) creation of infrastructure, and 3) government purchases, or procurement. The latter category is perhaps the most prevalent form of program and serves as the chief catalyst for growth and innovation by small firms.<sup>66</sup>

The research on innovation indicates that society and the economy benefit even more from innovation than the innovators themselves.<sup>67</sup> Also implied is that some beneficial innovations will not be undertaken because the expected return is too low for both large and small companies. It is in the interest of the U.S. economy therefore that all firms, small and large, have the opportunity to profit from innovative activity.

In a general way, government economic policies can encourage innovation by giving appropriate attention to market imperfections affecting small firms that are efficient innovators but may be less able to garner economic gain from their innovations. Creating a fully competitive environment for small firms may yield a large social payoff.

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<sup>66</sup>See, e.g., U.S. Small Business Administration, supra note 2.

<sup>67</sup>Id.



In addition, government can and does play a major role in encouraging innovation simply by purchasing its R&D requirements from a variety of sources. Half of all R&D funding comes from the government.<sup>68</sup> It is widely believed that this R&D spending by the government is critical to the process of technological innovation. In a study conducted by the Organisation for Economic Co-operation and Development, executives were surveyed in 52 industries in six countries to determine which government activities best facilitated innovation in their firm. The survey respondents overwhelmingly selected government's procurement role as the chief catalyst of innovation.<sup>69</sup>

Government procurement is particularly vital to the new, small high technology firms responsible for so much of the nation's innovative activity. These firms usually have limited profits and capital to support their research. A study of 33 high technology, fast-growing firms shows that nearly one-half depended upon government contracts for more than 50 percent of their revenue.<sup>70</sup> Two-thirds stated that government R&D spending was an important source of their funding for the technological

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<sup>68</sup>Id. at 11.

<sup>69</sup>Rothwell and Zegveld, Industrial Innovation and Public Policy, 1981, pp. 52-53.

<sup>70</sup>U.S. Small Business Administration, supra note 2, at note 22.

research necessary to bring their product(s) to the market.<sup>71</sup> Without government contracts during the early years, many currently highly innovative and successful companies would never have survived their infancy.

Despite the advantages of a neutral procurement policy, government contracting still favors large companies. Small firm participation in R&D procurement is less than its participation in private sector R&D activity. The small firm percentage of Federal R&D expenditures is about 2.75 percent, about two-thirds of the small firm percentage of total Federal and private funding, at 4.21 percent.<sup>72</sup>

It is unclear why this funding discrepancy exists. One possible barrier to full small firm participation is the size of government contracts; many tend to be too large for small firms to handle. Other possible barriers include the fixed costs to business of learning about and responding to R&D procurements, and the perceived risks of dealing with a small firm.

Recognizing the necessity of fueling the engine of technological innovation, Congress has established the Small Business Innovation Research (SBIR) program which encourages the various Federal agencies with R&D budgets to contract with small

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<sup>71</sup>U.S. Small Business Administration, Case Studies Examining the Role of Government R&D Contract Funding in the Early History of High Technology Companies, 1980, p. 122.

<sup>72</sup>U.S. Small Business Administration, supra note 2, at 12.

firms.<sup>73</sup> The twelve government agencies with R&D budgets over \$100 million annually participate in the SBIR program. Each agency is required to dedicate a small percentage of its external R&D budget exclusively to small business contracting.

### III. THE FCC AND SMALL BUSINESS

#### A. The Small Business Advisory Committee

The Commission has established a Small Business Advisory Committee ("SBAC") for the purpose of ensuring that small business have a forum within the FCC through which to express their interests. The SBAC has played a very active role in particular in evaluating how the Commission should prioritize small businesses in licensing PCS. Specifically, the SBAC solicited and received testimony from a variety of small business interests at its May 27, 1993 quarterly meeting and public hearings.

#### B. The Regulatory Flexibility Act

As noted above, the RFA requires Federal agencies, including the FCC, to conduct analyses of the impact of proposed regulations on small businesses. The initial regulatory flexibility analysis conducted in docket 90-314 determined that PCS "may provide new opportunities for radio manufacturers and suppliers of radio equipment, some of which may be small businesses, to develop and sell new equipment," and that PCS "may

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<sup>73</sup>See The Small Business Innovation Development Act of 1982, 15 U.S.C. § 631 et seq.

provide new telecommunications services that may greatly impact the abilities of small entities to conduct business."<sup>74</sup> Due to the broad range of new PCS services, the Commission was "unable to quantify other potential effects on small entities," and solicited public comment on this issue.<sup>75</sup> Finally, the initial regulatory flexibility analysis indicated that the Commission was "unaware of other alternatives which would provide . . . spectrum flexibility in the immediate future" for the development of new innovative PCS technologies, and requested public comment.<sup>76</sup>

The Statement of the SBA's Office of Advocacy before the SBAC suggested that the Commission could best satisfy its obligation to provide small businesses with access to PCS opportunities by conducting a thorough regulatory flexibility analysis. Specifically, the Office of Advocacy recommended that the final regulatory flexibility analysis ask the question "does the Commission's licensing scenario enhance small business participation, maintain the same level of participation or reduce participation by small businesses?"<sup>77</sup> Furthermore, the Office of Advocacy noted that "[a] proper regulatory flexibility analysis

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<sup>74</sup>In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676, 5740 (1992).

<sup>75</sup>Id.

<sup>76</sup>Id.

<sup>77</sup>Statement of Barry Pinelas, supra note 7, at 2.

will identify potential alternatives that will further enhance small business participation in PCS."<sup>78</sup>

As explained in detail in the foregoing Joint Petition for Further Rulemaking, AMT/DSST proposed in their Comments in Docket 90-314 a means for promoting small business participation in PCS, from both a technological and a regulatory perspective. This Joint Petition for Further Rulemaking elaborates on AMT/DSST's original regulatory alternative for small business participation and provides the Commission with a vehicle to develop a complete record on, among other things, the impact that the ultimate PCS licensing structure will have on small businesses.<sup>79</sup> In the process, the Commission will be in a position to properly satisfy its obligations under the RFA.

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<sup>78</sup>Id.

<sup>79</sup>AMT/DSST submit that their Joint Petition for Further Rulemaking complements the Office of Advocacy's suggestion that the Commission "issue a further notice of proposed rulemaking to obtain comments on the method of establishing . . . auctions and the protections that small businesses need to have to ensure their ability to participate in PCS technology." Statement of Barry Pinelas, supra note 7, at 4.

### CONCLUSION

Given the predominant role that small businesses play in the nation's economy, and their leadership in the areas of job creation, innovation, and research and development, it is not surprising that the Federal Government has increased efforts directed toward encouraging small business growth, including growth in the area of PCS. As the most important chapter in the PCS industry's history begins to unfold, however, there is an inherent risk that small business participation in that industry will be limited not only by the use of competitive bidding to award licenses, but also by the terms and conditions attached to PCS licenses held by large businesses. Unless such terms and conditions guarantee small businesses in general, and small PCS providers in particular, open access to PCS facilities and services, small businesses will be severely restricted in their ability to continue to fuel the nation's economic engine.